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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 875

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, OFFICE OF TEMPORARY CONTROLS, PETITIONER

v.

ROYAL LEE, DOING BUSINESS AS VITAMIN PRODUCTS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

Philip B. Fleming, Temporary Controls Administrator, Office of Temporary Controls, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Emergency Court of Appeals entered on December 13, 1946, in the case entitled *Royal Lee, doing business as Vitamin Products Company* v. *Philip B. Fleming,* Temporary Controls Administrator, declaring that Revised Maximum Price Regulation No. 296 was invalid from its inception insofar as it applied to specially milled whole wheat flour of the type of respondent's Deaf Smith Flour.

OPINION BELOW

The opinion of the Emergency Court of Appeals (R. 141) has not yet been reported.

JURISDICTION

The judgment of the Emergency Court of Appeals was entered on December 13, 1946 (R. 148). The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, 56 Stat. 23, 32, as amended, and Section 240 of the Judicial Code, as amended, incorporated by reference in said Section 204 (d).

QUESTION PRESENTED

Whether, in a proceeding to determine the validity of a maximum price regulation, commenced by the filing of a complaint under Section 204 (e) of the Emergency Price Control Act of 1942, as amended, the Emergency Court of Appeals may ignore the Administrator's findings of fact and make findings of fact upon its independent consideration of the evidence.[1]

STATUTE AND REGULATION INVOLVED

The statute and regulation involved are the Emergency Price Control Act of 1942, as amended

[1] While the ultimate question in this case, the validity of the regulation, is not one which we would present alone as a ground for certiorari, we wish to reserve the right, should certiorari be granted, to urge this Court to decide that the regulation is valid, and that the court below erred in reaching a contrary conclusion. For a brief discussion of this question, see pp. 15–16, *infra*.

(herein sometimes referred to as the "Act"), and Revised Maximum Price Regulation No. 296, as amended (herein sometimes referred to as the "Regulation" or "RMPR"). The pertinent provisions are set forth in the Appendix, *infra*, pp. 18–29.

STATEMENT

The respondent began this proceeding by filing a complaint with the Emergency Court of Appeals under Section 204 (e) of the Act, as amended (R. 88). The complaint was filed pursuant to leave granted by the United States District Court for the Eastern District of Wisconsin after that court had entered a judgment against the respondent in a civil proceeding brought by the petitioner to enforce the Regulation (R. 95). In that proceeding, the court found that the respondent had made sales of Deaf Smith Flour at prices in excess of the maximum prices established therefor by RMPR No. 296, and enjoined further violations and entered a judgment for damages pursuant to Section 205 (e) of the Act (R. 94).

In his complaint to the Emergency Court of Appeals, the respondent alleged that RMPR No. 296 was not generally fair and equitable as applied to his product—a specially milled whole wheat flour—on the grounds that (1) his flour was superior to ordinary commercial flours with which it was classified for pricing purposes; (2)

the applicable maximum prices did not cover his costs of production, and (3) historically his product had commanded prices higher than the other whole wheat flours with which it had been classified for pricing purposes (R. 88).

Pursuant to Section 204 (e) of the Act and Rule 18 of the Rules of the Emergency Court of Appeals (50 U. S. C. App. (Supp. V) fol. sec. 924), the respondent filed with that court an application for leave to introduce evidence in support of his objections (R. 95). The court, on December 26, 1945, ordered that the respondent present this evidence to the Administrator, and also authorized the introduction of such other evidence as the Administrator deemed it necessary or proper to receive (R. 129). The respondent presented evidence, consisting of an affidavit by Royal Lee, to the Administrator (R. 3–28) and the Administrator incorporated into the record various materials in support of the Regulation (R. 29–47). The respondent then filed a rebuttal affidavit (R. 48–56).

Subsequently, in accordance with Section 204 (e) of the Act, Rule 15 (b) of the Rules of the Emergency Court of Appeals (50 U. S. C. App. (Supp. V) fol. sec. 924), and the express terms of the court's order of December 26, 1945, the Administrator issued a statement containing his findings with respect to the evidence and issues presented in the proceeding (R. 76–86). The

Administrator found that the respondent had failed to establish that his flour possessed outstanding indicia of superiority over other whole wheat flours, that the respondent's product had no record of a historical price premium during a representative peacetime period, and that it had not been shown that similar flours customarily commanded a premium price (R. 78, 79).

The court below held that these findings of fact were entitled to no weight whatever in a proceeding brought under Section 204 (e) of the Act, and made findings based upon its own independent consideration of the evidence. On that consideration of the evidence, the court below found that (1) specially milled whole wheat flours of the type and kind of Deaf Smith Flour have for many years been recognized in the trade as being different and distinctive from the standard commercial whole wheat flours and (2) by reason of what is believed to be their higher nutritional values by physicians and others, "specially milled flours of the type of Deaf Smith Flour have at all times been sold at prices higher than those paid for standard commercial whole wheat flours." (R. 141.) On the basis of these findings, the court concluded that the Administrator had been arbitrary and capricious in failing to provide a premium maximum price for Deaf Smith Flour (R. 147).

SPECIFICATION OF ERRORS TO BE URGED

1. The Emergency Court of Appeals erred in construing the Act as giving the court power, in a proceeding brought pursuant to Section 204 (e) of the Act, to ignore the administrative findings and to make an independent determination of the facts.

2. The Emergency Court of Appeals erred in failing to apply the proper standards of judicial review of administrative action in accordance with which the determinations and findings of the administrative body are, if supported by substantial evidence, conclusive; and in substituting its inferences and conclusions for those of the Administrator.

3. The Emergency Court of Appeals erred in treating a proceeding under Section 204 (e) of the Act as an original lawsuit between parties litigant, instead of one of judicial review of administrative action.

4. The Emergency Court of Appeals erred in its findings of fact, in its conclusions therefrom, and in holding the regulation invalid.

REASONS FOR GRANTING THE WRIT

1. The issues in this case involve basic questions of the construction of the administrative and judicial review provisions of the Act and of the scope of judicial review of administrative action in general. The court below held that in a

proceeding brought under Section 204 (e) of the Act, attacking the validity of a maximum price regulation, it had the power to make findings of fact upon its independent consideration of the evidence. The court conceded, however, that in a proceeding brought under Section 204 (a) of the Act, attacking the validity of the same maximum price regulation, it would not have had that power but would have been bound by the findings of fact made by the Administrator, if they were supported by "substantial evidence" (R. 144). In effect, therefore, the court purported to discover in the same statute two different standards for the judicial review of administrative action depending upon whether review was sought under Section 204 (a) or Section 204 (e) of the Act.

Such a construction of the statute accords different treatment, without reason, to violators as against the great majority of persons who complied with the regulations applicable to them and, when necessary, raised objections to such regulations by way of protests under Section 203 (a) and sought judicial review by way of Section 204 (a). Equally without reason, that construction discriminates as between violators. Persons who violated but who seek a retroactive determination of validity under Section 204 (a) would find the court below applying the "substantial evidence" rule, but violators proceeding under Section 204 (e) would be accorded an independent

consideration of the evidence by the court in addition to that given by the Administrator.

The proper construction of these provisions is important to the continuing rent control program and to the final disposition of the enforcement proceedings against past violators of maximum price regulations and orders. At the present time, there are twelve cases pending before the court below which were brought under Section 204 (e) of the Act. In addition, despite the withdrawal of maximum price regulations covering practically all commodities, there are presently pending more than 4,500 cases involving alleged price violations. There are approximately an equal number of such cases pending involving alleged violations of maximum rent regulations and orders. Each of the defendants in these cases has the right to seek leave to file a complaint under Section 204 (e) of the Act. Moreover, about 8,000 additional violations of price and rent regulations have been reported and are in the process of investigation. It may be expected that enforcement proceedings will be instituted in some substantial number of these cases.

It is submitted that the effect of the decision in the court below inevitably will be to encourage persons subject to enforcement suits, who would not otherwise do so, to seek judicial review of the validity of regulations and orders which they are charged with violating, in the hope, by proceeding

under Section 204 (e) of the Act, of securing the benefit of a difference in judgment between the court and the administrative agency charged with the task of carrying out the purposes of the Act. That result will seriously interfere with the orderly and expeditious liquidation of matters arising under a temporary war-time regulatory measure.

2. The court below improperly construed the Act. It is submitted that Congress, in enacting Section 204 (e), merely intended to give persons involved in enforcement proceedings, who had a reasonable and substantial excuse for failing to file a protest under Section 203 (a), a right to test the validity of the regulation or order which they were charged with violating, and, to that extent, to put such persons in the same position as persons who filed protests under Section 203 (a) and sought judicial review under Section 204 (a). There is no suggestion in the statute or its legislative history that it was intended to give complainants under Section 204 (e) any different or greater rights than are enjoyed by complainants under Section 204 (a).[2]

[2] See S. Rep. No. 922, 78th Cong., 2d sess., pp. 12, 13: "In the proposed amendment, the committee has attempted to give adequate weight to the above considerations and yet to provide against the possibility that a defendant might be punished criminally for violating a regulation which, *but for excusable failure on his part to file a timely protest*, he might have successfully challenged in the Emergency Court of Appeals." [Italics supplied.]

In fact, the provisions of Section 204 demonstrate the contrary intention, as the court below apparently recognized in *150 E. 47th Street Corp.* v. *Porter,* 157 F. 2d 682 (E. C. A.). Section 204 (e) (1) expressly provides that "The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection." In the case cited, the court below properly held that if a complainant under Section 204 (e) applies to introduce evidence, the court, if it determines that the evidence should be admitted, has no discretion but to order the evidence to be presented to the Administrator, unless that official requests that it be presented directly to the court, just as if the proceeding were one begun under Section 204 (a) of the Act. There is no warrant in the legislative history for the court's assumption that these provisions demonstrate only a Congressional intent that the Administrator "shall serve merely as an examiner to receive the evidence and report it to the court without any duty or power to make findings of fact therefrom." (R. 146) Congress was very much concerned, however, to preserve the basic procedures and standards for judicial review set up by the Act, whether the court proceeding

arose under Section 204 (a) or Section 204 (e); Congress did not intend to reduce the Administrator to the status of a mere examiner to receive evidence and report it to the court.

The court below sought to justify its decision on the ground that (R. 145):

> A suit in this court under Section 204 (e) is, therefore, not in any sense a review of the result of a prior administrative hearing, since there has been none, but on the contrary is ancillary to the enforcement suit in which the question of validity has arisen and is in aid of the determination of that suit.

This observation ignores the fact that whether or not judicial review of an administrative regulation or order is preceded by administrative consideration of a protest, the court is nevertheless reviewing the exercise of administrative judgment embodied in the regulation or order itself. Furthermore, the fact that the beginning of a suit in the court below under Section 204 (e) has not been preceded by an administrative hearing in the particular case is no indication that Congress did not intend that there be no administrative hearing subsequent to the filing of suit. As we have indicated briefly above, Congress intended and provided for such an administrative hearing in every case in which the Administrator thought that there were issues of fact of sufficient

importance to warrant administrative consideration of the evidence with respect thereto.

The statement of the court below that were it not for the provisions of Section 204 (d) (the exclusive jurisdiction provision of the Act), the enforcement court would determine the validity of the administrative action, and that "such a determination would be made upon findings made by that court upon the evidence before it" (R. 145) is based on the assumption that in such event, there would be no opportunity for the Administrator to make findings of fact. But that assumes the very question in issue in this case, namely, whether Congress did provide for a procedure by which the Administrator could, in a proceeding brought under Section 204 (e), make findings of fact. That Congress did provide such a procedure was recognized by the court below, as we have said, in *150 E. 47th Street Corp.* v. *Porter, supra.* It is wholly unrealistic and improper to ignore that fact in considering the issue involved in this case. Once it is recognized that there is, in fact, a procedure under which the Administrator may make findings of fact in a Section 204 (e) proceeding, a procedure which was followed in the instant case, the conclusion that the court is bound thereby follows as a matter of course.

3. The judicial proceeding under Section 204 (e) is, as we have indicated, a proceeding by which

administrative action is reviewed. That being so, the independent examination of the record in which the court below indulged brings its decision into conflict with a long line of decisions of this Court. It has been often held that where administrative action is being reviewed, the judicial function is exhausted when it is found that there is substantial evidence in the record to support the administrative findings and that there is a rational relationship between the conclusion reached and the statutory standards. See *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), pp. 87–92, 115–120, and cases cited. This Court has applied these standards both in cases arising under statutes containing specific provisions defining the scope of review,[8] and in cases governed by legislation which

[8] Section 204 (b) of the Act, expressly made applicable to this proceeding by Section 204 (e), Appendix, *infra*, p. 27, provides that "No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. * * *" These provisions are, in substance (see *infra*, p. 14) indistinguishable from those upon which this Court rested its decisions in *Federal Communications Commission* v. *WOKO, Inc.*, No. 65, this Term; *Unemployment Compensation Commission of Alaska* v. *Aragan*, No. 25, this Term; *Dobson* v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231. Compare *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 130; *Gray* v. *Powell*, 314 U. S. 402, 411–413; *Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, 227, *et seq.*, somewhat analogous to the case at bar, involving promulgation of standards for vitamin-enriched cereals.

makes no mention of the extent of power of the reviewing court.[4] Indeed, the "courts developed standards as to the scope of judicial review when legislation did not provide them. To a large extent, subsequent legislation dealing with the matter has either enacted the judicially formulated standards or has been so interpreted by the courts that no difference resulted." *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), p. 87. Hence it is wholly accurate to characterize the approach of the court below as inconsistent with that line of cases of which those cited in notes 3 and 4, *supra*, are but examples.

The mere fact that the Administrator is a party to the suit to which the proceeding under Section 204 (e) of the Act is said to be ancillary does not alter the weight to be given to the administrative determination. But the court below was startled by the suggestion that "a party to a controversy which is pending in a court for determination should have the right, pendente lite, to adjudicate factual issues involved in the litigation" (R. 145). This Court, however, has never held that because an administrative officer is a

[4] *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 145; *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 184; *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 352; *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541; *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 224.

party litigant he is disqualified from exercising his official functions.[5] The decisions relied on by the court below in this connection do not support its position, since in both *Tumey* v. *Ohio*, 273 U. S. 510, and *National Berkshire Employees Ass'n, Etc.* v. *National Labor Relations Board*, 121 F. 2d 235 (C. C. A. 3), it was personal bias, not official interest, which resulted in disqualification. In the instant case, there is not even the slightest suggestion of any such bias.

4. We submit that application of the proper standards of judicial review would have resulted in a decision by the court below upholding the validity of RMPR No. 296 as applied to the respondent's product. In applying the proper standard of review under Section 204 (b) of the Emergency Price Control Act, the findings of fact justifying the Administrator's regulation or order, whether contained in a statement of considerations or in a subsequent opinion of the Administrator, must be taken by the court as correct unless the person challenging validity offers sufficient evidence to overcome the presumption of validity of the regulation or order. *Montgomery Ward & Co.* v. *Bowles*, 147 F. 2d 858

[5] This Court could not have reached the conclusions it did in many cases, were the contrary deemed to be the law. See, e. g., *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9; *United States* v. *Morgan*, 313 U. S. 409; *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364. Compare *Evans* v. *Gore*, 253 U. S. 245.

(E. C. A.); *Suwannee Fruit & Steamship Co.* v. *Porter,* 156 F. 2d 545 (E. C. A.), *Halibut Producers Cooperative* v. *Porter,* 157 F. 2d 332 (E. C. A.). But even if the complaining party has offered evidence to the contrary, as the court below recognized (R. 144),

> In conformity to the customary pattern of such judicial review of administrative determinations the findings of the Administrator, if supported by substantial evidence, are treated as conclusive.

Even cursory examination of the record demonstrates that there is "substantial evidence" to support the Administrator's finding that the respondent's product does not possess special qualities sufficient to distinguish it from whole wheat flours generally (R. 82; compare R. 15, with R. 34, 42), and to support the conclusion that products such as respondent's have not customarily commanded a premium price (R. 78; compare R. 52, with R. 45).

Even if it were not clear that, had the court below applied the proper standards of review, it ought to have reached the conclusion that RMPR No. 296 was valid as applied to respondent's product, we submit that its error as to its function was so basic that review by this Court is required. Otherwise, there will not have been the judicial

review of the administrative action plainly contemplated by Congress.*

CONCLUSION

The court below substituted its judgment for that of the administrative agency charged with the responsibility for administration of the Act. Its decision, therefore, is inconsistent with the Act, the applicable decisions of this Court, and is not warranted by the record in this case. For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

CARL A. AUERBACH,
General Counsel,
Office of Price Administration,
Office of Temporary Controls.

JANUARY 1947.

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* See *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 207–209.

APPENDIX

The pertinent provisions of the Emergency Price Control Act of 1942, 56 Stat. 23, as amended by the Stabilization Extension Act of 1944, 58 Stat. 632, the Joint Resolution of June 30, 1945, 59 Stat. 306, 50 U. S. C. App. (Supp. V) 901, *et seq.*, and by Pub. Law No. 548, 79th Cong., 2d Sess., are as follows:[1]

> SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Adminis-

[1] Roman type is used to indicate text which has not been changed since original enactment or issuance, and italics and bold face type are used to indicate amendments.

trator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941: *Provided, That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods.*[1] Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order, *and shall give consideration to their recommendations.*[2] In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion

[1] Added by Section 102 of the Stabilization Extension Act of 1944.

of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable, *and such recommendations shall be considered by the Administrator.*[2] Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection. *In administering the provisions of this subsection relating*

[2] Added by Section 102 of the Stabilization Extension Act of 1944.

to the establishment of industry advisory committees, the Administrator, upon the request of a substantial portion of the industry in any region, shall promptly appoint a regional industry advisory committee for such regions.[3]

* * * * *

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. *Under regulations to be prescribed by the Administrator, he shall provide for the making of individual adjustments in those classes of cases where the rent on the maximum rent date for any housing accommodations is, due to peculiar circumstances, substantially higher or lower than the rents generally prevailing in the defense-rental area for comparable housing accommodations, and in those classes of cases where substantial hardship has resulted since the maximum rent date from a substantial and unavoidable increase in property taxes or operating costs.*[4] Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-

[3] Added by Section 4 of Pub. L. No. 548, 79th Cong., 2d Sess.

[4] Added by Section 102 of the Stabilization Extension Act of 1944.

area housing accommodations, at the time of the issuance of such regulation or order.

* * * * *

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not

admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall con-

sist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. *Two judges shall constitute a quorum of the court and of each division thereof.*[5] The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a

[5] Added by Section 107 (a) of the Stabilization Extension Act of 1944.

seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e) [6] (1) *Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205* **of this Act or section 37 of the Criminal Code,**[7] *involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated* **or conspired to violate.**[7] *The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Ad-*

[6] Entire Subsection (e) added by Section 107 (b) of the Stabilization Act of 1944.

[7] Added by Section 6 of the Joint Resolution of June 30, 1945.

ministrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) *In any proceeding brought pursuant to section 205* of this Act **or section 37 of the Criminal Code,**[1] *involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—*

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205 **of this Act or section 37 of the Criminal Code,**[1] *setting forth objections to the validity of such provision which the court finds to have been made in good faith; and*

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted there-

[1] Added by Section 6 of the Joint Resolution of June 30, 1945.

under in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205 **of this Act or section 37 of the Criminal Code,**[1] *nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.*

The pertinent provisions of Revised Maximum Price Regulation No. 296, as amended (8 F. R. 16282, 9 F. R. 5985), are as follows:

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[1] Added by Section 6 of the Joint Resolution of June 30, 1945.

APPENDIX A

VI.[8] *Maximum prices for family cake flour, and family whole wheat flour, and for family farina, enriched and unenriched.* —(a) At all destinations, the maximum prices for family cake flour and family whole wheat flour shall be as follows:

(i) When packed 12 2¾-pound packages or 24 1¼-pound packages to the case, $2.75 per case. When packed in cases of other sizes the maximum price shall be determined by dividing $2.75 by 12 when pricing 2¾-pound packages and by 24 when pricing 1¼-pound packages and multiplying the applicable result by the number of packages packed in the case.

(ii) When packed in packages containing 5 pounds or less, other than the packages and case sizes covered by (1) hereof, 7⅓ cents per pound plus the cost of packages, labels and shipping containers.[9]

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[8] Section VI establishing separate maximum prices for sales of flour in small packages was added to RMPR 296 by Amendment 3, issued on May 31, 1944 (9 F. R. 5985).

[9] Amendment 11 to RMPR 296, issued and effective on August 2, 1946, increased the delivered price east of the Rocky Mountains of all flours $1.11 per cwt. to compensate for removal of the subsidy and increased wheat costs (11 F. R. 8485).

U. S. GOVERNMENT PRINTING OFFICE: 1947